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40

Cal. Sup. Ct.

SUPREME COURT OF THE UNITED STATES.

No. 376.

JOHN J. McGLYNN, EXECUTOR, &c., OF D. C. BRODERICK, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY S. MAGRAW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

Affirmed

Nov 26/69

SUPREME COURT OF THE UNITED STATES.

No. 319.

JOHN A. McGLYNN, EXECUTOR, &c., OF D. C. BRODERICK, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY S. MAGRAW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court, before you, between Henry S. Magraw and John A. McGlynn, executor of the last will and testament of David C. Broderick, deceased, a manifest error hath happened, to the great damage of the said John A. McGlynn, executor, etc., as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, A. D. (1865,) one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

G. C. GORHAM,
Clerk Circuit Court of the United States
for the District of California and Oregon
in and for the North, District of California.
Pr. JOHN O. WHEELER, *Deputy.*

To the honorable justices of the Supreme Court of the United States:

The return to the preceding writ of error appears by the transcript of the record and proceedings in the within-mentioned case of Henry S. Magraw *vs.* John A. McGlynn, executor, &c., hereto annexed.

Witness my hand and the seal of the supreme court of the State of California hereto affixed, this twenty-fourth day of July, 1865.

[SEAL.] WM. D. HARRIMAN,
Clerk of the Supreme Court of California,
By WM. G. WOOD, *Deputy Clerk.*

Filed January 27, 1865.

W. D. HARRIMAN, *Clerk,*
By W. G. WOOD, *Dep. Clerk.*

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court, before you, between Henry S. Magraw and John A. McGlynn, executor of the last will and testament of David C. Broderick, deceased, a manifest error hath happened, to the great damage of the said John A. McGlynn, executor, etc., as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

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G. C. GORHAM,
Clerk Circuit Court of the United States
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in and for the North, District of California.
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To the honorable justices of the Supreme Court of the United States:

The return to the preceding writ of error appears by the transcript of the record and proceedings in the within-mentioned case of Henry S. Magraw *vs.* John A. McGlynn, executor, &c., hereto annexed.

Witness my hand and the seal of the supreme court of the State of California hereto affixed, this twenty-fourth day of July, 1865.

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Clerk of the Supreme Court of California,
By WM. G. WOOD, *Deputy Clerk.*

Filed January 27, 1865.

W. D. HARRIMAN, *Clerk,*
By W. G. WOOD, *Dep. Clerk.*

1 In the Supreme Court of the United States.

JOHN A. MCGLYNN, ex'or, &c., plaintiff in error,
vs.
HENRY S. MAGRAW, defendant in error.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

George F. Worth, being duly sworn, says that he is a deputy United States marshal for the northern district of the State of California; that on the seventh day of February, A. D. 1865, he received from the attorneys of the plaintiff in error in the above-entitled action the citation hereto annexed, and that on the seventh day of February, A. D. 1865, he duly served the same on Messrs. Patterson, Wallace & Stow, the attorneys for the defendant in error in the above-entitled action, by reading and exhibiting to W. H. Patterson and W. T. Wallace, esqs., two of the members of said firm, the original citation herein, and leaving with him a copy thereof.

And this affiant further says that on the seventh day of February, A. D. 1865, he deposited in the post office, in the city and county of San Francisco, a copy of said citation enclosed in an envelope and addressed to the said defendant in error, "Henry S. Magraw, esq.," at "Lancaster, Pennsylvania," his place of residence, and that he prepaid the postage on the same.

GEORGE F. WORTH,
U. S. Deputy Marshal.

Subscribed and sworn to before me this seventh day of February, A. D. 1865.

JOHN O. WHEELER,
U. S. Com. District of California.

2 United States of America to Henry S. Magraw, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein John A. McGlynn, executor of the last will and testament of David C. Broderick, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Hon. S. W. Sanderson, chief justice of the supreme court of the State of California, at the city of Sacramento, this twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty-five.

S. W. SANDERSON,
Chief Justice of the State of California.

3 *Transcript on appeal.*

In the supreme court of the State of California.

HENRY S. MAGRAW, respondent, *vs.* JOHN A. McGLYNN, executor, etc., of D. C. Broderick, deceased, appellant.	Appeal from the probate court of the city and county of San Francisco.

In the probate court of the city of San Francisco the respondent, Henry S. Magraw, filed his petition, in words and figures following, viz:

To the honorable the probate court of the city and county of San Francisco:

The petition of Henry S. Magraw respectfully showeth: That he is a creditor of the estate of David C. Broderick, deceased, for the amount of principal and interest, and the current exchange between the city of San Francisco and the city of New York, due upon a promissory note executed by the deceased in his lifetime, and indorsed to the petitioner, and in the words and figures following:

"$10,500 00. NEW YORK, *July* 1*st*, 1858.

"Ten months after date I promise to pay to the order of A.
4 Welch, at the Chemical Bank, ten thousand five hundred dollars, without defalcation, for value received.

"(Signed) D. C. BRODERICK.

"Indorsed:

"WASHINGTON, *Dec.* 22*d*, 1858.

"Received on the within three thousand five hundred dollars.

"$3,500. A. WELCH.

"Pay to the order of H. S. Magraw.

"A. WELCH.

"APRIL 20, '59.

"I hereby waive demand and protest and all notice of non-payment. "A. WELCH."

That no part of the principal or interest specified in said note has been paid, except the sum of three thousand five hundred dollars advanced and paid on the twenty-second day of December, 1858, and that there are no offsets or counter claims against the same. That petitioner's claim arising upon said note has been duly presented to John A. McGlynn, the sole acting executor of the last will and testament of said Broderick, deceased, and was by said executor duly approved and allowed on the 28th day of August, 1861, for the amount of seven thousand dollars, with interest from May 1st, 1859, and exchange as aforesaid; and said claim was on the fourth day of October, 1861, also presented to, and allowed and approved by, the probate judge of said city and county, and was on said last-mentioned day duly filed in said probate court, and from thence hitherto has been

and still is one of the recognized claims against said estate. That the total amount of claims and liabilities against said estate which have been allowed and approved and filed in the office of the clerk of said court does not exceed the sum of $150,000, and the time allowed by law for presenting claims against said estate has fully elapsed. That the said deceased left a last will and testament, which was duly admitted to record and probate by this court on the eighth day of October, 1860. That on the twentieth day of October, 1860, letters testamentary were duly issued by said court to John A. McGlynn, one of the executors named in said will, who qualified as such executor on the twentieth day of October, 1860, and has since, on or about the tenth day of January, 1861, been, and still is, acting as the sole executor of the estate of said deceased. That said probate court had lawful jurisdiction, power, and authority to admit said will to probate and to issue said letters testamentary, the deceased having died at, and at the time of his death being an actual resident of, the city and county of San Francisco, and leaving real and personal estate therein. That in pursuance of an order of this honorable court, made on the seventh day of November, 1861, the said McGlynn duly sold at public auction, for gold coin of the United States, all the real estate of which the deceased died seized, situate in said city and county. That the gross proceeds of such sale and sales amounted to $323,795, or thereabouts. That the expenses of said sales do not exceed, as petitioner is informed and believes, the sum of $6,000, leaving a net balance of $317,795, to be applied to the payment of the debts and liabilities of the estate. That all of said sales have been duly confirmed and approved by this court, and the said McGlynn, as executor, has executed and delivered to the several purchasers of the said real estate deeds of conveyance therefor. That between the said seventh day of November, 1861, and the first day of May, 1863, the said McGlynn, executor, as aforesaid, received in current United States gold coin from the sales of said estate the sum of $323,795, which is applicable to the payment of the debts and liabilities of the said estate.

Wherefore, petitioner prays that this court compel the rendering of a full account and report of said executor's administration of said estate from the time of his said appointment, exhibiting not only the debts which may have been paid, but also a statement of all debts which have been duly presented and allowed against said estate, and the amount of current United States gold coin received by said executor from all sources, as assets of said estate, and as proceeds of the sale of the real and personal estate belonging to said estate; and that a citation be issued requiring the said executor to appear and show cause why such account and report should not be rendered; and that upon the coming in of such account and report, an order and decree be made by this court directing the said executor forthwith to pay to petitioner in United States gold coin, estimated at the legal value thereof, the amount of principal and interest, and accruing interest, together with the current exchange between the city of San Francisco and the city of New

York, as aforesaid, due to the petitioner upon his claim and demand; and that said executor be also ordered and decreed to pay, in like gold coin, all the allowed and approved debts of said estate, and in default of such account and report being rendered, that said executor appear and show cause why an attachment should not be issued against him.

Dated January 4th, 1864.

PATTERSON, WALLACE & STOW,
Attorneys for Petitioner.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Michael Kane, being duly sworn, says: He is the agent and attorney in fact of the above-named petitioner; that said petitioner is not within the State of California; that affiant is better acquainted with the facts stated in the foregoing petition than the said Magraw is; that the foregoing petition is true of affiant's own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

MICHAEL KANE.

Sworn to before me January 4th, 1864.

A. J. JEGHERS, *Deputy Clerk.*

Indorsed: Filed January 4th, 1864.

A. J. JEGHERS, *D. C.*

7 The further proceedings in the cause appear below in the statement.

Statement on appeal.

In the probate court in and for the city and county of San Francisco, State of California, in the matter of the estate of David C. Broderick, deceased.

On the application and petition of Henry S. Magraw for order to executor to account and for distribution.

On the twenty-eighth day of August, 1861, the following claim against the estate of David C. Broderick was filed in this court, allowed and approved by the executor and the district judge:

$10,500. NEW YORK, *July 1st*, 1858.

Ten months after date I promise to pay to the order of A. Welch, at the Chemical Bank, ten thousand five hundred without defalcation, for value received.

D. C. BRODERICK.

Indorsed: WASHINGTON, D. C., *December 22d*, 1858.

Received on the within three thousand five hundred dollars, ($3,500.)

A. WELCH.

Pay to the order of H. S. Magraw.

A. WELCH.

APRIL 20th, '59.

I hereby waive demand and protest, and all notes of non-payment.

A. WELCH.

Claim of Henry S. Magraw against the estate of David C. Broderick, deceased.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

On this tenth day of January, A. D. 1860, personally appeared before me, Nicholas Callan, a commissioner of deeds, duly
8 appointed by the governor of California, to reside at Washington city, in the District of Columbia, Henry S. Magraw, of the city of Lancaster, in the State of Pennsylvania, who is personally known to me, and who being first duly sworn by me, deposes and says that there is now fully due and owing to him from the estate of David C. Broderick, late of the city of San Francisco, California, deceased, upon the promissory note hereto attached, the sum of ten thousand five hundred dollars, less three thousand five hundred dollars advanced and paid on the twenty-second day of December, 1858, with interest from maturity of the note, and also the current exchange between the city of San Francisco and the city of New York. That the said indebtedness is founded upon the said note, which before its maturity was transferred to him for a full and valuable consideration by A. Welch, the payee of the note, by his endorsement thereon written. That the sum of seven thousand dollars with interest from May 1st, 1859, and exchange as aforesaid, is now justly due and owing to him, the said Henry S. Magraw, from the estate of the said David C. Broderick, on the said note, and that no payment or payments have been made thereon, and that, to his knowledge, there are no offsets to the same.

HENRY S. MAGRAW.

Sworn and subscribed before me.

N. CALLAN,
Commissioner for California.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, Nicholas Callan, a commissioner of deeds, duly appointed by the governor of California, to reside at Washington city, in the District of Columbia, do hereby certify that the foregoing deposition of Henry S. Magraw was sworn to and subscribed by him in my presence, on the tenth day of January, A. D. 1860, at my office, in said city, and the said Henry S. Magraw is personally known to me to be the individual described in said deposition.

9 In witness whereof, I hereunto set my hand and official seal the day and year aforesaid.

[L. S.]

N. CALLAN,
Commissioner for State of California.

DISTRICT OF COLUMBIA, *Washington County, ss:*

Also, on the same day, personally appeared before me, Nicholas

Callan, commissioner as aforesaid, Aristides Welch, of the city of Washington, who is personally known to me, and who, being duly sworn, deposes and says that he is the person referred to as A. Welch in the foregoing affidavit of Henry S. Magraw, and that he has read the same, and that the facts therein stated and set forth are true.

A. WELCH.

Subscribed and sworn before me.

N. CALLAN,
Commissioner for California.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, Nicholas Callan, a commissioner of deeds, duly appointed by the governor of California, to reside at Washington city, in the District of Columbia, do hereby certify that the foregoing deposition of A. Welch was sworn to and subscribed by him in my presence, on the tenth day of January, A. D. 1860, at my office, in said city, and that the said A. Welch is personally known to me to be the individual described in said deposition.

In witness whereof, I hereunto set my hand and official seal the day and year aforesaid.

[L. S.]

N. CALLAN,
Commissioner for California.

Indorsed: The within claim allowed and approved this twenty-eighth day of August, 1861.

JOHN A. McGLYNN, *Executor.*

10 Allowed and approved this fourth day of October, A. D. 1861.

M. C. BLAKE, *Probate Judge.*

Filed October 4th, 1861.

C. BARTLETT, *Deputy Clerk.*

On the fourth day of January, 1864, Henry L. Magraw, by his attorneys, Patterson, Wallace & Stow, filed his petition in this court praying for an order of this court compelling the executor of the said estate to render an account and report of his administration, and upon the same day the court granted the following order:

In the matter of the estate of David C. Broderick, deceased.

In open court, January 4th, 1864.

Present: Hon. M. C. Blake, probate judge.

On reading and filing the application of Henry S. Magraw, dated this day, (duly verified by his agent, &c., a person interested as a creditor, whose claim has been duly allowed and approved,) in the estate of David C. Broderick, deceased, setting forth, among other things, that John A. McGlynn was duly appointed executor of the last will and testament of deceased, and has been acting as such since the tenth day of January, 1861, and is still so acting, and that said executor has never rendered any account or report of his administration, and praying this court or the judge thereof to compel

said executor to render a full account of his administration of said estate; and also setting forth the amount of debts and liabilities allowed against said estate, and showing that said executor has received from the sales of real estate, in current gold coin of the United States, more than sufficient moneys to pay the expenses of the funeral and last sickness of deceased, and all charges and expenses of administration, and further praying that said executor be
11 required to pay petitioner, in current United States gold coin, estimated at the legal value thereof, the debt due and owing to petitioner mentioned in said petition, and for an order for the payment of all debts owing by said estate in similar coin: It is hereby ordered that the said John A. McGlynn, executor aforesaid, on or before the eleventh day of January, 1864, render and file with the clerk of this court a full account and report of his administration of said estate, showing the amount of debts and liabilities allowed and approved against the estate of said Broderick, showing the expenses of and charges of administration, and showing the amount of all sales of real and personal estate which have been made by said executor, and the amount of moneys received by him therefrom, specifying the dates and times when received, and the kind of coin and currency in which such moneys were received by said executor, and that upon a failure thereof, a citation issue requiring said executor to appear and show cause why an attachment should not issue, such citation to be made returnable in ten (10) days from that day; and that upon the coming in of said account and report, the said executor and the legatees, devisees, and all persons interested in the estate of deceased show cause on said eleventh day of January, 1864, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, at the court-room of this court, in the city hall, why an order should not be made that all debts and liabilities of the estate of said deceased should not be forthwith paid, and that a copy of this order be served on the said John A. McGlynn.

M. C. BLAKE, *County Judge.*

Dated January 4th, 1864.

On the 11th day of January, 1864, the executor appeared in obedience to the said order; and subsequently, to wit, on the 11th day of February, 1864, the hearing having been continued until that day, the executor filed his account as follows:

12 John A. McGlynn, executor, in account with the estate of D. C. Broderick, deceased.

DR.

To cash received from sales of real estate, as per account of Cobb & Sinton, on file	$276,913 50
To cash from rents received	4,100 00
	281,013 50

CR.

By cash paid as follows, to wit:

Funeral and medical expenses	$4,719 02
Taxes	15,128 98
Attorneys' fees and administration	19,245 92
J. A. Bauer	32 75
T. J. Broderick	14 50
Collins & Tiffany	10 00
Estate of R. C. Wood	1,200 00
J. D. Hoover	508 45
Estate of J. O'Meara	485 90
W. E. Dennis	536 84
McGlynn	186 15
W. H. Gawley	547 62
John Madison	10 00
J. McDevitt	356 92
D. Hewes	749 45
W. M. White	188 37
J. H. Shafer	449 00
Geo. Dougherty	145 90
C. T. Webster	33 00
A. H. Houston	923 20
S. Merritt	9,149 25
J. H. Turney	1,527 00
G. W. Blasdell	118 33
O'Callaghan & Haight	6,141 67
J. Mora Moss	7,258 33
J. J. Blanchard	2,253 33
Costs U. S. circuit court	122 90
J. G. Clumpke	772 62
J. Boardman	245 60
Outstanding claims	126,987 09
A. Welch	21,000 00
Balance	59,965 36
	281,013 42

To balance ..... $59,965 36.

San Francisco, February 11, 1854.

JOHN A. McGLYNN,
Executor of the estate of D. C. Broderick, deceased.

Indorsed: Filed February 21st, 1864.

WM. LOEWY, *Clerk*,
By A. F. JEGHERS, *Dep. Clk.*

On the same day the court made an order appointing the 29th day of February, 1864, as the day for the settlement of said account. On the 29th day of February, 1864, the petitioner, Henry S. Magraw, by his attorney, filed his opposition to the allowance of the executor's account, as follows:

13

In the probate court, city and county of San Francisco, State of California, in the matter of the estate of David C. Broderick, deceased.

And now comes Henry S. Magraw, a creditor of the estate of David C. Broderick, deceased, and avers and shows, that heretofore, on the 4th day of January, A. D. 1864, he filed a petition in this court, duly verified, which he hereby refers to and makes a part of this petition and opposition, and which petition, so filed as aforesaid, sets forth and shows that he is a creditor of the estate of the deceased, and that his claim as such has been duly allowed and approved both by John A. McGlynn, esq., the executor of the estate of said deceased, and by the Hon. M. C. Blake, judge of the probate court of the city and county of San Francisco, and the said claim is still due and owing to him.

And the said Magraw further shows that all the money and proceeds of the sale of property of the estate of said deceased, mentioned and set forth in the account of John A. McGlynn, esq., executor of said estate, filed in this court on the 11th day of February, 1864, was received by and came to the hands of said executor in gold coin of the United States, and not in any other or different currency; that the said account, so filed as aforesaid, does not specify in what coin or currency said moneys were received by said executor. Said Magraw therefore objects to the allowance of said account until the said executor shall specify and disclose that said moneys were received by him in gold coin of the United States. And the said Magraw prays that the said executor be forthwith ordered and decreed to pay the said debt and claim owing to him in current United States gold coin, and in no other currency.

PATTERSON, WALLACE & STOW,
Attorneys for H. S. Magraw.

14 Indorsed: Filed February 29, 1864.
WM. LOEWY, *Clerk,*
By A. J. JEGHERS, *Dep. Clk.*

On the 8th day of March, 1864, the hearing having been continued until that day, the executor, by his attorneys, filed his answer to the exceptions and opposition of the petitioner to the allowance of said account as follows:

STATE OF CALIFORNIA, *City and County of San Francisco:*

In the probate court, in the matter of exceptions of Henry S. Magraw, a creditor of said estate, to the account of John A. McGlynn, executor.

The said executor comes, and in answer to the exceptions and objections of the said McGraw and his application for further particulars, says that his account is in all respects full and complete as he is advised and believes, and that this hon. court has no jurisdiction or legal authority to require the further details or particulars as moved or objected by the said Magraw, and submits that his said objections

and exceptions are insufficient in law, and should be denied and disallowed.

And for further answer to the exceptions and objections of said McGraw, this executor avers, on his information and belief, that the claim of said McGraw is based on a certain promissory note, a copy of which is contained in the petition of said McGraw, on file herein, and to the original of which this executor begs leave to refer. That the said promissory note was made and delivered in the city and State of New York, at its said date, and was and is made payable at the Chemical Bank, which is also in said city of New York, and that this executor, through an agent in that behalf selected, has caused to be tendered, and on his information and belief he avers that said agent did tender, to said McGraw, at said Chemical Bank, on or about the day of A. D. 1864, the full amount then due on said promissory note
15 for principal and interest, according to the tenor and effect of said note, in lawful money of the United States, and that the same was then and there refused by said McGraw. And he further avers on his information and belief, that, said money now remains deposited at said Chemical Bank, subject to the order of said McGraw, and as the amount due on his said note, being the full amount due for principal and interest; and that the said lawful money of the United States, so tendered, was then and still is, as the executor is informed and believes, the usual circulating medium in said New York city, and is and was then and there receivable, and is and then was received in payment and satisfaction, generally, of all debts and liabilities existing between private persons.

And this executor is informed, advised and believes, and submits to this hon. court, that as an executor and officer it was his duty to so pay and tender the payment of said debt as aforesaid, and that the exceptions of said McGraw should be disallowed, and that he shall be ordered to take and receive the said funds so tendered him and so remaining deposited to his use at said Chemical Bank, in payment of his said claim and debt.

JOHN A. McGLYNN, *Executor*,
By HOGE & WILSON, *his Attorneys*.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

John A. McGlynn, being duly sworn, deposes and says that he has read the foregoing answer to the exceptions of Henry S. McGraw, and knows the contents thereof, and that the said answer is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true, and that he is the sole executor of said estate.

JOHN A. McGLYNN.

16 Sworn to and subscribed before me this 8th day of March, A. D. 1864.

A. J. JEGHERS, *Deputy Clerk*.

Indorsed: Filed March 8, 1864.

WM. LOEWY, *Clerk*,
By A. J. JEGHERS, *Deputy Clerk*.

After argument by counsel, the court took the matter under advisement, and subsequently, to wit, on the twelfth day of March, 1864, ordered its decision, sustaining the exceptions filed by the petitioner, and overruling the answer to the same filed by the executor; to which ruling the executor, by his counsel, excepted.

On the same day, to wit, on the twelfth day of March, 1864, the court made an order directing the executor to file an amended account on or before the seventeenth day of March, 1864; to which the executor then and there, by his counsel, excepted.

On the seventeenth day of March, 1864, the executor filed his amended account as follows:

In the probate court in and for the city and county of San Francisco, State of California—estate of David C. Broderick, deceased.

In the matter of the petition and application of H. S. McGraw, a creditor, as to the account of the executor filed in this court:

The executor, John A. McGlynn, comes and in obedience to the order of this court, made and entered on the twelfth day of March, 1864, and amends his account filed in this court on the eleventh day of February, 1864, by adding thereto and reporting that the funds received and disbursed by him, as mentioned and set forth in
17 his said account, were all of the description and kind of money designated as United States gold coin.

March 17th, 1864.

JOHN A. McGLYNN,
Executor of the said Estate.

Indorsed: Filed March 17th, 1864.
WM. LOWEY, *Clerk*,
By A. J. JEGHERS, *Deputy Clerk.*

Whereupon the court, by an order, allowed the said account as amended, and directed the executor to pay the claim of the petitioner, as follows:

In the probate court of the city and county of San Francisco, State of California, in the matter of the estate of David C. Broderick, deceased.

Now again comes John A. McGlynn, executor of the last will and testament of David C. Broderick, late of said city and county, deceased, in person, and by Messrs. Hoge & Wilson, his attorneys; and come also the legatees and devisees in said last will and testament mentioned, by their attorney, R. S. Harrison, esq.; and also comes Henry S. Magraw, esq., a creditor of said estate, by Messrs. Patterson, Wallace & Stow, his attorneys; and the said John A. McGlynn, said executor as aforesaid, having heretofore, to wit, on the eleventh day of February, A. D. 1864, rendered for settlement in this court his annual account of his administration of said estate, and an order having been duly made on that day appointing Monday, the twenty-ninth day of February, A. D. 1864, being a day of a term of this court, to wit, of the regular January term thereof, at the hour of eleven o'clock

a. m. of that day, in the court-room of this court, for the settlement of said account, and directing that notice be given by the clerk, by causing notices to be posted in at least three public places in
18 said city and county, at least ten days before said day of settlement, according to law. And afterwards, to wit, on the said twenty-ninth day of February, A. D. 1864, at eleven o'clock a. m. of that day, the said matter coming on to be heard, and proof having been made to the satisfaction of the court that notice of the settlement of said account has been duly given by the clerk of this court, as required by law, and in conformity to the said order of this court of the eleventh day of February, A. D. 1864, by causing notices to be posted at least ten days before the said twenty-ninth day of February, A. D. 1864, in three public places in said city and county, to wit: one at the place where this court is held, one at the United States post-office, and one in the hall of records of said city and county; which notices set forth the name of said estate and the said executor, and also the said twenty-ninth day of February, 1864, at eleven o'clock a. m., as being the day appointed for the settlement of said account; and on said twenty-ninth day of February, 1864, the devisees and legatees mentioned in said last will and testament, having appeared by R. S. Harrison, esq., their attorney, and Henry S. Magraw, a creditor of said estate, having appeared by Patterson, Wallace & Stow, his attorneys, and said executor appearing in person and by his said attorneys, thereupon said Magraw, by his attorneys, filed his certain exceptions in writing to said account, and said executor having thereupon filed his written reply to said exceptions, which said exceptions and the reply thereto, and the sufficiency of said exceptions and reply thereto having been argued by the respective counsel of said executor and for said Magraw, and the same having been taken under advisement by the court until the twelfth day of March, A. D. 1864, and said exceptions having been afterwards, to wit, on the said twelfth day of March, 1864, sustained by the court, and the objections of the said executor to the said exceptions having been overruled and adjudged insufficient, and on motion of said Magraw, it having been on said last-mentioned day ordered that said executor do, on or before the seventeenth day of March, 1864, amend his said account, so filed in
19 this court, so as to show how much, if any, and what amount mentioned and reported in said account as having been received by said executor of the assets of said estate was and is of the kind or description of money known as and called United States gold coin; and said executor having now this day, in obedience to the said order of this court, amended his said account in that respect and filed in open court his amendment to said account, whereby it appears that all of said moneys so reported in said account to have been received by said executor as such assets of said estate was received by him in United States gold coin; and no person appearing to further contest the said account as now so amended, and no exceptions or objections being filed to said account as now so amended, nor to any part thereof, and it appearing to the court that said account

as so amended contains a just and full statement of all the moneys received and disbursed by said executor from the commencement of his administration of said estate to the eleventh day of February, 1864, including all sums of money belonging to said estate which came to his hands as executor, or were received by any other person by his order or authority for his use as such executor during said period, that the amount of said money thus received was $281,013 42; which said sum was received by said executor in United States gold coin, and not in any kind or description of money or currency other than United States gold coin; and that the amount of money disbursed by said executor from the commencement of his administration of said estate to the said eleventh day of February, 1864, was $222,048, leaving now in the hands of said executor, in United States gold coin, the sum of $59,965 36 to the credit of said estate, and all parties appearing admitting that said account as now so amended is just and correct. And it further appearing, and being admitted by all parties appearing, that the said Henry S. Magraw is a creditor of said estate in the sum of ($7,000) seven thousand dollars, principal, drawing interest from the fourteenth day of May, 1859, which interest at this date amounts to ($3,412 50) three thousand four hundred and twelve dollars and fifty cents; and that his claim against said estate, amounting in principal and interest now accrued to the sum of ($10,411 50) ten thousand four hundred and twelve dollars and fifty cents, has been duly allowed, approved, and filed in this court on the fourth day of October, 1861, and is on file herein, and wholly unpaid and unsatisfied; and it further appearing to the court that there is a sufficiency of money in the hands of said executor to pay the said debt and claim of said Henry S. Magraw, and applicable by law to the payment thereof, and that said money so in the hands of said executor applicable to the payment of the said debt and claim of said Magraw is of the kind and description so called United States gold coin, and not of any other kind or description; and it appearing further to the court that the circumstances of said estate permit and require that said debt and claim of said Magraw should be paid off and discharged: It is therefore now here ordered, adjudged, and decreed that the said account of the said John A. McGlynn, executor as aforesaid, as the same is amended under the order of this court as aforesaid, be, and the same is hereby, in all respects, approved, allowed, and settled; and on the application of said Henry S. Magraw, by his said counsel, now here made, it is now here further ordered, adjudged, and decreed that the said John A. McGlynn, executor of the last will and testament of said David C. Broderick, deceased, do, within twenty-four hours, pay to the said Patterson, Wallace & Stow, counsel of said Henry S. Magraw, for said Henry S. Magraw, of San Francisco, in United States gold coin, the full amount of his said claim, principal and interest, which has accrued thereon to this day, to wit: the sum of ten thousand four hundred and twelve dollars and fifty cents, ($10,412 50,) and that he take the receipt and acquittance of the said Henry S. Magraw or his attorneys therefor, and file the same in this court. To which or-

der and judgment directing the payment of said claim of said Magraw, in so far as the same directs the payment thereof to be made
21 in United States gold coin, the said executor excepts. And upon motion of said executor, it is ordered that all further proceedings herein be stayed for ten days, to enable said executor to take and perfect an appeal to the supreme court.

Dated March 17th, 1864.

M. C. BLAKE, *Probate Judge.*

To which order the executor, by his counsel, excepted then and there.

And the executor assigns as error the orders and decree of said court requiring the executor to set forth and show the kind of currency in which the funds referred to in his account were received, and also the decree requiring the payment to said Magraw in gold coin of the United States.

We hereby consent and agree that the foregoing statement shall be taken as the statement on appeal in this case, the same having this day been settled by us.

San Francisco, March 24th, 1864.

PATTERSON, WALLACE & STOW,
Attorneys for Magraw.

HOGE & WILSON,
Attorneys for the Executor, John A. McGlynn.

Indorsed: Filed March 24th, 1864.

W. HARNEY, *Deputy Clerk.*

Notice of appeal.

In the probate court in and for the city and county of San Francisco, State of California, in the estate of David C. Broderick, deceased. Matter of the petition of Henry S. Magraw, a creditor, for settlement of account and payment of his debt.

You will please take notice that the executor, John A.
22 McGlynn, in the above entitled estate hereby appeals to the supreme court of this State from the order and decree of said probate court, therein made and entered in the said court on the seventeenth day of March, A. D. 1864, in favor of said Henry S. Magraw, against said executor, and from the whole thereof, which decree, among other things, directed and decreed the payment by said executor of the debt of said Magraw.

Dated San Francisco, this twenty-eighth day of March, A. D. 1864.

Yours, etc.,

HOGE & WILSON,
Atty's for Appellant, John A. McGlynn.

To the clerk of said probate court, and Messrs. Patterson, Wallace & Stow, attorneys for respondent, Henry S. Magraw.

Indorsed: Filed this twenty-eighth day of March, A. D. 1864, at 1.55 o'clock p. m.

WM. LOEWY, *Clerk,*
By A. J. JEGHERS, *Deputy Clerk.*

Notice of appeal.

In the probate court in and for the city and county of San Francisco, State of California, in the estate of David C. Broderick, deceased. Matter of the petition of Henry S. Magraw, a creditor, for settlement of account.

You will please take notice that the executor, John A. McGlynn, in the above entitled estate hereby appeals to the supreme court of this State from the order and decree of said probate court, therein made and ordered in the said court on the seventeenth day of March, A. D. 1864, in favor of said Henry S. Magraw against said
23 executor, and from the whole thereof; which decree, among other things, directed and decreed the payment by said executor of the debt of said Magraw.

Dated San Francisco, this twenty-eighth day of March, A. D. 1864.

Yours, etc.,

HOGE & WILSON,
Attorneys for Appellant, John A. McGlynn.

To the clerk of said probate court, and Messrs. Patterson, Wallace & Stow, attorneys for respondent, Henry S. Magraw.

Indorsed: Service of a copy of the notice of appeal in this case, of which the within is a copy, is hereby admitted.

Dated San Francisco, Monday, March 28th, 1864, at two o'clock ten minutes p. m.

PATTERSON, WALLACE & STOW.

Indorsed: Filed this twenty-eighth day of March, A. D. 1864, at 2½ o'clock p. m.

WM. LOWEY, *Clerk,*
By A. J. JEGHERS, *D. C.*

Undertaking on appeal.

In the probate court of the city and county of San Francisco, State of California. In the estate of David C. Broderick, deceased. In the matter of the petition of Henry S. Magraw, a creditor, for settlement of the account and for payment of his debt.

JOHN A. MCGLYNN, executor of said estate, appellant,
vs.
HENRY S. MAGRAW, respondent,

Whereas the executor in this proceeding above named is
24 about to appeal to the supreme court of the State of California, from an order and decree, made and entered against him

in said proceeding, in the probate court, in favor of the above-named Henry S. Magraw, on the seventeenth day of March, A. D. 1864, for the payment of his debt of seven thousand ($7,000 00) dollars, and three thousand four hundred and twelve 59-100 ($3,412 59-100) dollars interest, in gold coin of the United States:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Erwin Davis, capitalist, a resident of the city and county of San Francisco, State of California, and David D. Colton, attorney at law, of the same place, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said order and decree, so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of twenty-two thousand ($22,000 00) dollars, (being double the amount mentioned in said order and decree,) that if the said order or decree appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal

Dated San Francisco, this twenty-eighth (28th) day of March, A. D. (1864,) eighteen hundred and sixty-four.

ERWIN DAVIS.
DAVID D. COLTON.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

Erwin Davis and David D. Colton, the persons named in
25 and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, say, and each for himself deposes and says, that he is worth double the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ERWIN DAVIS.
DAVID D. COLTON.

Subscribed and sworn to before me this twenty-eighth day of March, A. D. 1864.

[L. S.] ALFRED BARSTOW, *Notary Public.*

Indorsed: Filed this twenty-eighth March, A. D. 1864, at half-past four p. m.

W. HARNEY, *Deputy County Clerk.*